

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 16 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0066-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
JAIME RENE ESPINOZA,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20033528

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender  
By Joy Athena

Tucson  
Attorneys for Petitioner

\_\_\_\_\_  
ESPINOZA, Judge.

¶1 Petitioner Jaime Espinoza seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he had been unlawfully required to register as a sex offender. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Espinoza has not sustained his burden of establishing such abuse here.

¶2 In late 2003, pursuant to a plea agreement, Espinoza was convicted of criminal damage. The trial court suspended the imposition of sentence and placed him on probation for a period of three years. As a condition of probation, the court ordered that he register as a sex offender. The court later revoked probation and sentenced Espinoza to the presumptive, one-year term of imprisonment.

¶3 In 2010, nearly six years after the court imposed the one-year prison term, Espinoza filed a notice of post-conviction relief. In his notice and in his petition for post-conviction relief, he sought relief under Rule 32.1(h), arguing he was “actually innocent,” not of the charged offense, but of the requirement to register as a sex offender because there had been no lawful basis on which to require him to register.<sup>1</sup> The trial court summarily denied relief, concluding that because Espinoza had not raised his claim that

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<sup>1</sup>As required by Rule 32.2(b), Espinoza set forth a “[r]eason for not raising the claim earlier,” asserting that his attorneys had “labored under a misconception that [he] was required to register as a sex offender,” and that it was not until “new defense counsel” in another action against him moved to dismiss on similar grounds to those presented here that he became aware that he should “pursue separate Rule 32 relief” in this action. Because we conclude Espinoza was not entitled to relief under Rule 32.1(h), we need not address the sufficiency of this asserted reason.

the court had erred in ordering him to register in a timely Rule 32 petition, it was precluded. The court further ruled it did “not arise under any of the exceptions to Rule 32’s preclusion requirements.” On review Espinoza makes the same arguments he made below, asserts his due process rights were violated because he “was not legally required to register as a sex offender,” and argues the trial court abused its discretion in determining his claim was precluded.

¶4 A notice for post-conviction relief in an of-right proceeding must be filed “within ninety days after the entry of judgment and sentence.” Ariz. R. Crim. P. 32.4(a). When a proceeding is not initiated timely, a defendant may raise claims only under Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a). Espinoza asserts his claim is one of “actual innocence” made under Rule 32.1(h). That rule provides a defendant is entitled to relief if he “demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h).

¶5 According to Espinoza, he “was actually innocent of the ‘pre-condition’ that the judge found had existed in order to require him to register as a sex offender.” And, he argues, without citation to authority, “Although the actual innocence finding here would not overturn [his] conviction for criminal damage, the order that he register as a sex offender has such far reaching implications that it[] . . . must be given the same scrutiny as claims of actual innocence of an underlying conviction.” But, contrary to Espinoza’s claim that “Rule 32.1(h)’s language is ambiguous when applied to this

situation,” the language of Rule 32.1(h) makes clear it does not apply here. That rule provides relief when a defendant demonstrates he was innocent of the “underlying offense,” not when, as here, his claim is that the sentence is unlawful. Ariz. R. Crim. P. 32.1(h). Thus, although we grant the petition for review, we deny relief.<sup>2</sup>

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

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<sup>2</sup>Espinoza also asserted, without supporting argument, that “[h]e did not raise th[is] claim in a timely manner because his former counsel [had been] ineffective.” He does not however make any claim of ineffective assistance of counsel on review and we therefore do not address that claim. See Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain “[t]he reasons why the petition should be granted” and “specific references to the record”).